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Nos. 07-21 & 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,

Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,

Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

TODD ROKITA, *et al.*,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICI CURIAE CHRISTOPHER S. ELMENDORF AND DANIEL P. TOKAJI IN SUPPORT OF PETITONERS

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INTEREST OF THE AMICI CURIAE

Amici teach and write about constitutional law as it bears on the democratic process. We have studied closely the recent federal and state court opinions concerning allegedly burdensome conditions on the franchise, and the Supreme Court precedents that these decisions purport to apply. With the consent of the parties, we submit this brief in the interest of clarifying the constitutional standard in voter participation cases.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

This is the first case since 1974 that calls upon the Court to adjudicate a claim that a State has unconstitutionally hindered eligible voters' access to the polls.[2] Weighty interests are asserted by both sides. On one side is the right to vote, long recognized by this Court as "preservative of . . . basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). On the other side is Indiana's indisputably powerful interest in preventing voter fraud and protecting public confidence in the integrity of elections, as well as its need for latitude

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[1] The parties have filed blanket letters of consent to the filing of amicus briefs. This brief was not authored, in whole or in part, by counsel for a party, nor did anyone other than *amici* make a monetary contribution to fund it.

[2] The last such case was *O'Brien v. Skinner*, 414 U.S. 524 (1974).

to carry out the election administration responsibilities that the Constitution assigns to the States. Looming in the background is the federal judiciary's institutional interest in "rules to limit and confine judicial intervention" in partisan conflicts over the ground rules of electoral competition. *Vieth v. Jubelirer*, 541 U.S. 267, 301, 307 (2004).

Amici submit this brief with the goal of clarifying two aspects of the standard of review in constitutional challenges to the mechanics of the voting process. It is well understood that scrutiny levels vary with the "character and magnitude" of burdens on voting and associational rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "Severe restrictions" receive strict scrutiny, whereas lesser burdens are subject to a more deferential test. *Id.* What has not been clear to some lower courts—including the courts below—is (1) whether the standard of review for non-severe burdens is tantamount to the ordinary rational basis test, and (2) how to characterize a burden's severity when it concerns eligible voters' access to the polls, rather than candidates' access to the ballot or political parties' rights of association.

As explained more fully below, direct barriers to the casting of a valid, properly counted ballot must at least be *reasonably necessary* to important state interests in the integrity of the political process.[3] The

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[3] A "direct barrier," as that term is used herein, is any requirement with which the voter must comply in order to cast a valid, properly counted ballot.

test of reasonable necessity, though less demanding than strict scrutiny, requires more than hypothetical rationality.

A limited subset of barriers are properly classified as "severe," and hence subject to strict scrutiny. Three precepts, each well grounded in this Court's precedents, ought to guide the scrutiny-level-determining inquiry into severity.

First, a burden is severe if its consequences are severe. In assessing the consequences of direct barriers to voter participation, courts should focus on whether the requirement *unequally burdens* electoral participation by politically identifiable groups of citizens – for example, whether it skews turnout by eligible voters – and not merely on the *number* of voters adversely affected. This follows from the status of the right to vote as a right in service of representative self-government. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators").

Second, in measuring the effects of a challenged voting requirement, the court should compare that requirement to the typical regulatory alternative used in other States. Put differently, the court should focus on the unequal burden on

participation arising from the challenged requirement, as compared with the typical alternative found in other States. This benchmark concretizes the Court's longstanding premise that "ordinary and widespread" regulatory burdens on political participation are usually not considered severe. *See Clingman v. Beaver*, 544 U.S. 581, 593 (2005). It also respects the States' historic and constitutionally assigned role in administering elections. *See, e.g.*, U.S. Const. art. I § 2.

Third, absent reliable statistical evidence about consequences, courts should base scrutiny levels on the presence or absence of *danger signs* which speak to the likelihood of substantial, unjustified effects. *Cf. Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479, 2482 (2006) (holding that heightened scrutiny of campaign contribution limits is warranted when there is "strong indication in a particular case, *i.e.*, 'danger signs,' that ... risks [to the democratic process] exist").

Applying this framework to the instant case, this Court should vacate the decision below. As an initial matter, neither the district court nor the Seventh Circuit addressed the feature of Indiana's voter identification regime that is most difficult to justify under any level of scrutiny. We refer here to the peculiar and apparently unique requirement that indigent voters who are unable to obtain qualifying ID without payment of a fee (as well as religious objectors) make *two trips to vote* in each election. On the first trip, the voter swears out an affidavit stating that he is eligible to vote at the precinct in question, whereupon he may cast a provisional ballot. On the

second trip, the voter attests that he has a religious objection to being photographed or is indigent and unable to obtain ID without payment of a fee. The State's failure to make the indigency/religion affidavit available at the polling place appears arbitrary and thus unconstitutional, even under the lowest level of scrutiny that could apply to direct burdens on voter participation.

Alternatively, this Court should vacate and remand because the Seventh Circuit made three errors of law in determining whether to apply strict scrutiny. First, the circuit court looked at the sheer number of voters whom the ID requirement would dissuade from voting, without considering unequal effects on the demographic composition of the voting public. Second, the Seventh Circuit failed to compare Indiana's voter ID requirement to the typical voter identification regime used by other States. Third, after concluding that the Plaintiffs had not proven that the ID requirement would keep more eligible voters than impersonators from casting ballots, the Seventh Circuit failed to ask whether there was a "danger signs" basis for strict scrutiny – notwithstanding that several danger signs appear to be present. These include the Indiana photo ID requirement's extreme outlier status relative to the practices of other States; the law's enactment by a substantially party-line vote of the legislature; and its cumbersome procedure for accommodating indigent voters.

I. Laws Directly Burdening the Right to Vote May Not Be Upheld Unless

Reasonably Necessary to Serve Important Government Interests.

In *Burdick* and in subsequent cases about "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process," 504 U.S. at 433, this Court has held that strict scrutiny applies only if the "character and magnitude" of the burden on voting or associational rights is "severe." *Id.* at 434; *see also Clingman v. Beaver*, 544 U.S. 581, 591-92 (2005) (criticizing a prior decision in which the Court "applied strict scrutiny with little discussion of the magnitude of the burdens imposed," contrary to later cases which "clarified [that] strict scrutiny is appropriate only if the burden is severe"). Much less certain is the level of scrutiny properly applied to non-severe burdens. Although this Court has never used the words "rational basis" or cited rational basis precedents in describing that standard,[4] some lower courts—

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[4] There is one pre-*Burdick* case, *Clements v. Fashing*, 457 U.S. 957 (1982), that cites *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955) (rejecting an equal protection challenge to an assertedly arbitrary state law that regulated opticians while exempting sellers of ready-to-wear glasses, on the sweeping theory that the legislature is free to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"). *See Clements*, 457 U.S. at 969, 971. However, the opinion in *Clements* was for a plurality only, and concerned a subject (the eligibility of certain public employees to run for one office while

including, it appears, the district court in the instant case[5]—have understood rational basis to be the test.[6]

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holding another) far removed from direct barriers to the right to vote.

[5] *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 821, 829 (S.D. Ind. 2006) (stating that "the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves," but relying on *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955)). It is not clear what level of scrutiny the Seventh Circuit purported to apply, though the court's analysis was quite deferential. *See Crawford*, 472 F.3d at 952-54. What is clear is that the Seventh Circuit wholly failed to address the provision of the Indiana law most likely to fail the test of reasonable necessity. *See infra* Part II.

[6] The lower courts are split on the standard of review properly applied to non-severe burdens. Some have unambiguously deployed ordinary rationality review. *See, e.g., Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) ("defendants need only show that the enactment of the regulation had a rational basis," given that the burden at issue is "slight"); *Common Cause/Ga. v. Billups*, -- F. Supp. 2d --, 2007 WL 2601438 (N.D. Ga., Sept. 6, 2007) ("the appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further"). Others have clearly stated that it is stricter than the ordinary rational basis test. *See, e.g., McLaughlin v. N.C. Bd. of Elec.*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995)

Those courts have erred. At least where the challenged requirement represents a direct barrier to the voter's casting of a valid, correctly counted ballot, the law must be reasonably necessary to serve an important regulatory interest. Our position that reasonable necessity, not rational basis, is the standard of justification for direct but non-severe burdens on voter participation is supported by (1) the language of *Burdick*; (2) cases before and after *Burdick* in which the Court struck down election procedures without recourse to strict scrutiny; and (3) the distinctive harms that result from direct and hard-to-justify burdens on voter participation, as opposed to burdens on candidates' access to the ballot or political parties' associational freedoms.

(emphasizing "that a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational," and disagreeing with Eighth and Eleventh Circuit decisions which the Fourth Circuit construed as applying ordinary rational basis review in such circumstances); *Reform Party of Allegheny County v. Allegheny County Dep't of Elec.*, 174 F.3d 305, 314-15 (3d. Cir. 1999) (applying an "intermediate level of scrutiny" and striking down a ban on cross-endorsements by minor parties, the burden of which was judged "not severe" yet "not trivial"); *Cotham v. Garza*, 905 F. Supp. 389, 398-401 (S.D. Tex. 1995) (holding that even "limited, not severe" restrictions on the right to vote may not be sustained absent a showing of necessity).

A. *Burdick* Supports the Reasonable Necessity Standard.

The key language from *Burdick* on the level of scrutiny applicable to restrictions on the right to vote states:

> "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it *necessary* to burden the plaintiff's rights.
>
> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only *reasonable, nondiscriminatory restrictions* upon the First and

> Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal citations and quotation marks removed; emphasis added).

As this Court has thus clearly stated, the standard of review for non-severe burdens is more demanding than the rational basis test applied to ordinary economic regulations. Per the first paragraph, there must be some consideration of necessity. Per the second, the State's "important regulatory interests" are only *generally* sufficient to justify non-severe, non-discriminatory restrictions. And, most important, there must be a judicial determination that the restrictions at issue really are "reasonable and nondiscriminatory."

B. Cases Preceding and Following *Burdick* Also Support the Reasonable Necessity Standard.

The test applied to non-severe restrictions in *Burdick* and subsequent cases was first articulated in *Storer v. Brown*, 415 U.S. 724 (1974). It is evident from *Storer* and other cases that the Court has understood the standard to have bite against substantially arbitrary regulations without regard to the extent of the burden. This comports with our "reasonable necessity" formulation of the test.

In *Storer*, the Court suggested that a law which disqualified everyone who had voted in the

primary election—including persons who voted a nonpartisan primary ballot—from signing independent candidates' petitions for ballot access in the ensuing general election would be arbitrarily overbroad. *See id.* at 741 ("it would be difficult to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan voters at the primary..."). Also instructive is *American Party of Texas v. White*, 415 U.S. 767 (1974), where the Court held it unconstitutional for a state to print the names of ballot-qualified minor parties on in-person but not absentee ballots. *White*'s equal protection holding turned on the "arbitrary" and "obviously discriminatory" nature of this practice, rather than the application of strict scrutiny. *See id.* at 795.

That the default standard of justification for non-severe burdens is something more than mere rationality is implied as well by *Bush v. Gore*, 531 U.S. 98 (2000). *Bush* concerned the mechanics of the voting process. The *Bush* Court did not determine whether the burden was "severe" within the meaning of *Burdick*, nor did it need to. Under the cases already cited, non-severe burdens are subject to something more than ordinary rational basis review. *Cf. Bush*, 531 U.S. at 105 ("The recount mechanisms . . . do not satisfy the minimum requirement for nonarbitrary treatment of voters...."). At the very least, laws directly restricting participation, including the right to have one's vote counted, must be reasonably necessary to serve an important interest.

C. Even if the Standard for Some Burdens Is Mere Rationality,

Reasonable Necessity Must Remain the Minimum Standard for Direct Burdens on the Right to Vote.

Within the *Storer-Burdick* line are a handful of opinions that apply a relatively deferential standard of justification to certain regulations of the electoral process. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Clingman v. Beaver*, 544 U.S. 581 (2005). These decisions concern ballot access for candidates or the associational rights of political parties. By contrast, in *Bush* as in the instant case, the rules at issue bore directly on the voter's ability to cast a valid, correctly counted ballot.

This distinction matters, because the right to vote protects participatory as well as representational interests.[7] The "participatory" interest refers to citizens being able to vote without unreasonable impediment and to have their votes counted accurately. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1968) ("Any *unjustified discrimination* in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.") (emphasis added). The "representational" interest refers to citizens being able to aggregate their vote with others of like mind,

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[7] *See generally* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993).

so that their interests and concerns are adequately spoken for in government. *See, e.g., Reynolds v. Sims*, 377 U.S. at 565 ("in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators").

Barriers to ballot access for third parties and independent candidates often implicate voters' representational interests, but they rarely infringe upon voters' participatory interests. Such rules limit voters' choices, not their ability to participate by voting. Accordingly, this Court's ballot access jurisprudence has properly focused on the representational side of the right to vote. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 143-44 (1972) (noting that while the Court had "not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review," strict scrutiny of the candidate filing fees at issue was nonetheless appropriate because the fees "substantially limited [voters'] choice of candidates [in a manner that] obvious[ly] fall[s] more heavily on the less affluent segment of the community"); *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (reiterating that candidacy is not a fundamental right, and that the constitutionality of candidate restrictions therefore depends on "the nature and extent of their impact on voters"); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 974-76 (1998) (describing the representational purposes of the ballot access cases); *cf. Burdick*, 504 U.S. at 437-38 (rejecting the notion that voters have a strong, constitutionally protected

expressive interest in being able to cast a write-in vote for their candidate of choice). Because the voter's participatory interests are not at stake, modest ballot access barriers to third-party and independent candidates warrant relatively deferential review.

By contrast, voter participation interests are manifestly present whenever the State erects a direct barrier to the casting of a valid, properly counted ballot. These interests require, at the very least, that direct barriers be reasonably necessary to serve an important regulatory interest.[8]

Our democracy is founded upon the equal dignity of all citizens who are eligible to vote. *See Kramer*, 395 U.S. at 626 ("[S]tatutes distributing the franchise constitute the foundation of our representative society."); *Reynolds*, 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."). At a minimum, due respect for the equal dignity of all voters obliges the state not to create two classes of voters, one authorized to use a convenient voting procedure, the other required to use a more cumbersome procedure, absent a sufficiently

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[8] Nothing in the *Burdick* framework compels identical treatment of modest barriers to candidates' ballot access and modest barriers to voters' casting of a valid ballot. The threshold, scrutiny-level-determining inquiry properly accounts for the burden's "character" as well as its "magnitude." *Burdick*, 504 U.S. at 434.

important interest. *Cf. Am. Party of Texas v. White*, 415 U.S. at 795 ("permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."). As set forth in Part II, this is just what Indiana appears to have done.

II. This Court Should Vacate and Remand for the Lower Courts to Determine Whether Indiana's Two-Trips Requirement for Indigent Voters and Religious Objectors Is Reasonably Necessary to Serve Important State Interests.

On the existing record, Indiana's photo-ID requirement does not appear to satisfy the reasonable necessity standard. Especially problematic is a peculiar feature of Indiana's law that effectively requires certain voters to make two trips to the polls in each election. Because the lower courts failed to evaluate the two-trips requirement using the proper legal standard, this Court should vacate and remand. Unless the State can come forward with an important regulatory interest that the two-trips voting procedure is reasonably necessary to serve, the law should be found unconstitutional.

Indiana voters who are indigent and unable to obtain qualifying ID without payment of a fee or who object to being photographed for religious reasons may not cast a regular ballot on Election Day. They

may only cast a provisional ballot, which will be counted only if "by noon on the second Monday following election day, the voter appears before the county clerk of courts or the county election board and executes an affidavit that the person is the same as the person who cast the provisional ballot and...is indigent and...unable to obtain proof of identification without payment of a fee ... [or has] a religious objection to being photographed." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 787 (S.D. Ind. 2006) (internal quotation marks omitted); Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5. The indigent voter is thus required to make two trips in every election, the first to the polls on Election Day and the second to the county clerk or election board.

Amici see nothing that prevents the state from including an indigency checkbox ("I am indigent and I was unable to obtain ID without payment of a fee") on the provisional ballot form and thus saving indigent voters – for whom an extra bus trip to and from the county clerk's office may be a significant hardship – from having to make a second trip to validate their vote. Nor is there anything to prevent a similar checkbox for religious objectors. At most, there is a conceivable rational basis for the two-trips requirement (avoiding lines at the polling place), but whether this rationale is enough to satisfy the reasonable necessity standard is doubtful.

It bears emphasis that one of the two classes of citizens subject to two-trips voting is defined by indigency. This is unquestionably relevant to judging whether the requirement is reasonably necessary to advance important state interests. The Constitution

has long been understood to guard against voting burdens whose incidence falls disproportionately upon poor people, even though poverty is not a suspect classification for other equal protection purposes. Firmly established by *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), this principle has been repeated in numerous cases. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 717-18 (1974) (applying strict scrutiny to "moderate" filing fee requirement for ballot access, because "impecunious but serious candidates may be prevented from running"); *Clements v. Fashing*, 457 U.S. at 964-66 (observing that "heightened" equal protection scrutiny is more likely to be appropriate in ballot access cases if the classification at issue is "based on wealth"); *Anderson v. Celebrezze*, 460 U.S. at 793 ("it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or *economic status*") (emphasis added). *Cf. Hill v. Stone*, 421 U.S. 289, 298 n. 7 (1975) (noting that the voting requirement there subjected to strict scrutiny "may in effect [have] create[d] a property-related classification" with respect to the franchise).[9]

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[9] It is certainly true that that wealth is not generally a suspect basis for classification. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 980 (1973). All of the cases after *Harper* cited in the text post-date *Rodriguez*'s holding on this point; they recognize that burdens on *political participation* by poor people are different.

To be clear, *amici* do not argue that strict scrutiny is triggered by a voting regulation simply because the poor may find it more difficult to comply with than the affluent. But even under the reasonable necessity standard, the fact that a voting requirement particularly burdens the indigent must be factored into the court's assessment of necessity. In this case, the challenged statute acknowledges through its indigency "exception" that a generally applicable requirement imposes a disproportionate burden on a class of voters defined by wealth or income. Due respect for these voters' equal dignity requires that the corresponding accommodation not be needlessly cumbersome.

Neither court below passed on the two-trips issue. It was not even mentioned in the Seventh Circuit's opinion.[10] The district court noted the problem but declined to consider it and, moreover,

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[10] The issue was fairly raised. *See* Brief and Required Short Appendix of Plaintiffs-Appellants, Indiana Democratic Party and Marion County Democratic Cent. Committee at 25-26, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007) (Nos. 06-2218, 06-2317); Brief and Short Appendix of Appellants Crawford, United Senior Action of Indiana, Indianapolis Resource Center for Independent Living, Concerned Clergy of Indianapolis, Indianapolis Branch of the NAACP, Indiana Coalition on Housing and Homeless Issues, Joseph Simpson at 40, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (2007) (Nos. 06-2218, 06-2317).

improperly understood the legal standard to be mere rationality.[11] Accordingly, this Court should vacate the decision below and remand with a clarifying statement regarding the legal standard.

III. In Deciding Whether to Apply Strict Scrutiny, the Seventh Circuit Made Three Critical Errors That Independently Warrant Remand.

Because the decision below may be vacated on the ground that the lower courts failed to analyze the indigency and religious objector accommodation using the reasonable necessity standard, this Court need not resolve the question of whether strict scrutiny

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[11] The district court mentioned in a footnote that the two-trips problem (as to religious persons) had been raised in an amicus brief filed by the League of Women Voters, but the court declined to consider the argument on the grounds that it had not been "adopted" by the plaintiffs; that it was hypothetical (no individuals before the court had to comply with the requirement); and that it was not "clear that the [League of Women Voters] or any of the Plaintiffs have standing to raise such a challenge." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d at 830 n.85. But the standing worry is misplaced, at least on the theory of standing adopted by the Seventh Circuit; the "hypothetical" objection applies equally to every other aspect of facial, pre-implementation challenges; and the "not adopted by the parties" rationale would render almost all amicus briefing superfluous.

should have been applied to the Indiana voter ID requirement. However, in the event that the Court reaches this question, we set forth the test that should govern this determination and explain how the Seventh Circuit erred in its analysis.

The fulcrum issue is whether the "character and magnitude" of the burden on voting and associational rights is "severe." This Court's precedents support an approach to burden characterization with three defining features.

First, consequences matter. The most important consequence in voter participation cases is the degree to which the challenged requirements impose an unequal burden on certain classes of voters, by skewing the political demographics of voter participation relative to the population of eligible voters. This is so because right to vote serves not only the individual's interests in participating as such, but also his or her interest in being governed by a fairly elected legislature. Regulations that impose substantially unequal burdens on the voting public are therefore much more harmful than regulations with an equal impact across demographic groups. The inquiry we propose is grounded in a long line of constitutional voting rights precedents that attend to the distribution of burdens among politically identifiable groups of citizens, including those defined by income, place of residence, ideology, and race.

Second, for purposes of determining the appropriate level of scrutiny, the burden imposed by the challenged practice should be compared to typical alternatives used by other States. In other words, the typical practice of states should serve as a

benchmark, against which the challenged practice is judged. This benchmark norm, implicit in this Court's precedents, ought to be formally incorporated into the test for elevated scrutiny so that lower courts are duly focused in determining whether to intervene in disputes over the administration of elections.

Third, when conclusive empirical evidence about the effects of a particular practice is unavailable, as will often be the case, courts should key scrutiny levels to the presence or absence of objective "danger signs" which indicate whether the challenged requirement is likely to have an unequal burden on groups of voters defined by common political interests. *Cf. Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479, 2492-93 (2006) (relying on danger signs to negate the ordinary presumption of permissibility associated with campaign contribution limits).

As explained below, the Seventh Circuit failed to adhere to any of these precepts in determining the appropriate level of scrutiny. The court considered the number of eligible voters dissuaded from voting by the photo ID requirement, but not its skewing effect on the demographics of electoral participation. In addition, the court failed to compare Indiana's identification requirement to the typical practice of other States. Finally, the court failed to consider several danger signs that ought to be consulted in the absence of reliable statistical evidence about consequences.

D. The Seventh Circuit Erred in Not Focusing Its Burden Analysis on

Whether Indiana's Photo ID Requirement Imposes an Unequal Burden on Groups of Voters Defined by Common Political Interests.

The Seventh Circuit correctly recognized that the burden of a voting requirement is best measured by its consequences. *Crawford*, 472 F.3d at 952-54. *Cf. Storer v. Brown*, 415 U.S. 724, 742 (1974) (noting that for purposes of judging the severity of ballot access restrictions on independent candidates, "it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not"). But the circuit court erred in treating each lost vote just like the next, *i.e.*, in presuming that the proper level of scrutiny is simply a function of the total number of excluded voters (less the number of cases of fraud prevented). *See Crawford*, 472 F.3d at 952-54. More specifically, the court failed to focus its burden analysis on whether the challenged law imposed unequal burdens on certain voters that would skew voter participation.[12]

Such effects matter because the right to vote is not merely a signifier of the citizen's status as a full member of the political community. It is also a means of protecting the citizen's interest in being

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[12] In ruling on standing, the court recognized that the Indiana law might disproportionately burden Democratic voters, *Crawford*, 472 F.3d at 951, but when the court reached the merits such concerns were not part of the court's assessment of the standard of justification that the law must satisfy.

governed by representatives who are accountable to the normative electorate, comprised of all voting-eligible citizens.[13] *Cf.* U.S. Const. art. I § 2 & amend. XVII (providing, respectively, that members of the House of Representatives and the Senate are to be chosen by the people of the several States). To the extent that a voting regulation causes the political demographics of the voting public to deviate from that of the normative electorate, citizens who belong to the underrepresented groups sufier a representational harm.

This idea permeates much of this Court's constitutional jurisprudence on voting rights and political association. It extends back to *Reynolds v. Sims*, 377 U.S. 533 (1964), which recognized that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." *Id.* at 565. A few years later, in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court took another step toward solidifying the representative-participation norm, pronouncing that legitimate "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.* at 666.

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[13] It is well settled that the normative electorate includes all adult, citizen, non-felon residents of the jurisdiction in question. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1968); *Richardson v. Ramirez*, 418 U.S. 24 (1974).

In *Gordon v. Lance*, 403 U.S. 1 (1971), the Court rejected a *Reynolds*-based challenge to a supermajority voting rule for bond referendum elections, reasoning that "no independently identifiable group or category [of voters] favors bonded indebtedness over other forms of financing." *Id.* at 5. Because the voting rule did not disadvantage any discernable group of citizens defined by common political interests, there was no constitutionally cognizable burden. By contrast, the filing fees struck down in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), were thought to disproportionately impede candidates who would appeal to low-income voters. Looking back on this line of decisions, the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), inferred: "[I]t is especially difficult for the State to justify a restriction that limits political participation by *an identifiable political* group whose members share a particular viewpoint, associational preference, or economic status." *Id.* at 793 (emphasis added).

E. The Seventh Circuit Erred in Failing to Compare the Effects of Indiana's Photo ID Requirement to Typical Regulations of Other States.

The effects of a challenged law cannot be ascertained without comparing the law to some alternative. Because "there must be . . . substantial regulation of elections if they are to be fair and honest," *Anderson*, 460 U.S. at 788, it is impractical to use a no-regulation benchmark for purposes of gauging the severity of burdens on the right to vote. We suggest that the effects of the challenged

requirements should be compared to those that would arise from using typical regulations found in other States.

Though it was not explicit about this, the Seventh Circuit appeared to treat Indiana's previous voter identification requirements as the only relevant regulatory benchmark. *See Crawford*, 472 F.3d at 952-54 (weighing the number of eligible voters excluded against the number of impersonations prevented by the ID requirement). This misses, however, what may be the most relevant comparison. In determining the degree of burden imposed by a state rule of election administration, that rule should be compared to the typical practices of the other States. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 196-97 (1986) (reversing the Ninth Circuit for measuring ballot access burdens relative to the previous state law).

This approach honors the States' constitutionally assigned responsibility for managing elections, *see, e.g.*, U.S. Const. art. I § 2. It also concretizes the Court's longstanding premise that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases." *Storer v. Brown*, 415 U.S. at 730; *see also Clingman v. Beaver*, 544 U.S. at 593 (cautioning that "ordinary and widespread" voting requirements should not be deemed severe). Under this approach, practices that are within the mainstream are less likely to be found unconstitutional. In contrast, a state law that imposes exceptional burdens on a definable class of

voters, relative to other states, will face a greater burden of justification.

F. The Seventh Circuit Erred in Failing to Recognize the Place of "Danger Signs" in Determining the Proper Level of Scrutiny.

The record in this case is more slender than might be desired. Plaintiffs have presented little conclusive evidence proving the precise effects of Indiana's law on different groups of voters. At the same time, the State of Indiana has not established that impersonation fraud is a substantial problem. Under these circumstances, the courts must ask what presumptions ought to govern.

The Seventh Circuit imposed a high evidentiary standard on the plaintiffs, requiring them to "show[]"—presumably, with reliable empirical evidence[14]—that the ID requirement would keep more eligible voters than impersonators from casting ballots. *Crawford*, 472 F.3d at 953-54. At the same time, the court indulged in speculation about the likelihood of impersonation fraud. *See id.* at 953.

A different approach is needed. When judges intervene or decline to intervene based of their own hunches about the likely consequences of challenged election laws, they render the judicial system

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[14] The Seventh Circuit agreed with the district court that the Plaintiffs' principal empirical evidence was unreliable. *See Crawford*, 472 F.3d at 952.

vulnerable to the charge that case outcomes are determined by judges' partisan or ideological preferences. Insisting on hard evidence thus has obvious attractions. But a doctrine that required plaintiffs to introduce statistical proof of the challenged requirement's unequal burden would demand too much. Voter turnout is affected by many factors, including the competitiveness of elections, campaign spending, other races on the ticket, the presence of initiative or referendum questions, and more. Disaggregating the effect of a particular requirement on turnout may therefore be impracticable in many cases.

There is a third way, an alternative both to case-by-case judicial speculation and to unrealistic demands for social scientific proof: the use of *presumptions* concerning the likely effect of the challenged requirement and its means-end fit. This approach is implicit in this Court's constitutional jurisprudence about the voting process. To illustrate, regulations that place an express financial or property ownership condition on political participation always elicit strict scrutiny, as do regulations concerning the internal structure and organization of political parties. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Eu v. S.F. County Democratic Cent. Comm.,*, 489 U.S. 214 (1989). A plaintiff in such a case need not make any further empirical showing about the magnitude of the associated burden. Using the language of *Burdick*, one might say that the regulation is conclusively presumed to create a severe, scrutiny-elevating burden because of the form that it takes. *See generally* Christopher S. Elmendorf, *Structuring*

Judicial Review of Electoral Mechanics: Explanations and Opportunities, 156 U. PA. L. REV. (forthcoming Dec. 2007), draft available at http://ssrn.com/abstract=980079 (draft at 24-28) (discussing burdens "severe in kind").

Other severity presumptions are rebuttable, even before the court reaches the strict-scrutiny stage of justification. Consider the seminal case of *Storer v. Brown*, 415 U.S. 724 (1974), which is fairly read as establishing both a substantive performance standard for ballot access regimes and a set of readily verified evidentiary presumptions with which to implement it.[15] The performance standard is that ballot access restrictions must not be so severe that "reasonably diligent" third-party and independent candidates qualify only "rarely." *Id.* at 742. The corresponding evidentiary presumptions are tied to the available pool of prospective signatories (persons eligible to sign the candidate's or party's petition). Signature requirements of 5% or less are presumed permissible, *see id.* at 738-39, whereas requirements "approach[ing] 10%" trigger demanding judicial inquiry into the necessity of the restrictions, *see id.* at 743-44. This framework provides useful guidance for legislatures, and allows judges to dispose of many ballot access cases quickly. At the same time, it leaves open the possibility of outcome-based challenges to requirements of less than 5% if, over a long period of time, third parties or independents

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[15] For an elaboration of this reading of *Storer*, see Elmendorf, *supra*, draft at 30-33.

have qualified for the ballot at exceptionally low rates.[16]

We doubt that scrutiny levels in most constitutional challenges to voting requirements can be usefully determined using severe-in-kind or numerical-cutoff presumptions. More nuanced presumptions are needed. The way forward is well illustrated by Justice Breyer's plurality opinion in *Randall v. Sorrell*, -- U.S. --, 126 S. Ct. 2479 (2006), a case about campaign contribution limits. There are notable commonalities between the problem the Court faced in *Randall* and the problem it faces in this case. Campaign contribution limits are presumptively permissible, see *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 386-88 (2000); so too are most administrative regulations of the voting process, *cf. Storer*, 425 U.S. at 730 ("as a practical matter there must be a substantial regulation of elections *if they are to be fair and honest*") (emphasis added). Yet as Justice Breyer observed in *Randall*, it is also

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[16] For another example of a strong but rebuttable quantitative presumption in the constitutional jurisprudence of voting rights, consider malapportionment claims against state and local government districting plans. *Compare Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (deviations of less than 10% are prima-facie justified by "legitimate objectives") *with Cox v. Larios*, 542 U.S. 947 (2004) (summarily affirming district court opinion which struck down a 10%-compliant plan after finding that the plaintiffs had overcome the presumption of validity).

necessary for the courts to "recognize the existence of some lower bound," lest contribution limits end up threatening democratic accountability. 126 S.Ct. at 2492.

This is also true of voter identification laws: a cumbersome identification requirement that skews participation by eligible voters, while doing little to reduce the number of ineligible votes, would undermine democratic accountability. The *Randall* plurality's solution was to look for "strong indication in a particular case, *i.e.*, 'danger signs,' that . . . risks [to the democratic process] exist (both present in kind and likely serious in degree)." *Id.* The discovery of a danger sign would negate the otherwise applicable presumption of permissibility, requiring the court to "review the record independently and carefully with an eye toward assessing the...proportionality of the restrictions." *Id.* In *Randall*, Justice Breyer found such a danger sign in the fact that Vermont's contribution limits were the lowest in the Nation, and well below any that the Court had previously sustained. *Id.*

Similarly, Indiana's identification requirements for voting appear to be the most stringent in the Nation. According to *electionline.org*, a nonpartisan clearinghouse of information about election administration, only three States—Georgia, Florida, and Indiana—currently require photo identification as a prerequisite to casting a regular ballot. (Four other States request photo ID, but allow voters without an ID to sign an affidavit instead; another eighteen states require identity documentation but do not insist on photographic

ID.[17]) *See* Voter ID Laws, http://www.electionline.org/Default.aspx?tabid=364.

Georgia's and Florida's photo ID requirements are less stringent than Indiana's. In Georgia, any registered voter who avers that she lacks other qualifying ID and who furnishes minimal evidence of her identity (as little as a completed voter registration form or precinct card) will be provided with a free, State-issued photo ID card. *See Common Cause/Ga. v. Billups*, -- F. Supp. 2d --, 2007 WL 2601438 at *8-13 (N.D. Ga. Sept. 6, 2007). In addition, all Georgians registered to vote are entitled to vote absentee, without ID. *Id.* at *25-26. In Florida, the range of permissible forms of photo ID is substantially broader than in Indiana. *Compare* Fla. Stat. Ann. § 101.043(1) *with* Ind. Code § 3-5-2-40.5. More important, the Floridian without ID who casts a provisional ballot need not make two trips to get his or her vote to count. Provisional ballots enjoy a presumption of validity under Florida law, and will be counted unless (1) a preponderance of the evidence shows that the person named on the ballot was not entitled to vote at the precinct where the vote was cast, or (2) the signature on the provisional ballot envelope does not match the signature on the voter's registration card. Fla. Stat. Ann. § 101.048(2). In summary, while many States have required voters to

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[17] One other state, Missouri, has required a photo ID as a prerequisite to voting, but this requirement was struck down on state constitutional grounds in *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

provide some evidence of their identity, none go so far as Indiana in limiting the permissible forms of ID.

Amici submit that a robust danger-signs jurisprudence would also account for objective factors which tend to suggest that the challenged requirements were enacted for the purpose of disproportionately burdening some voters. As this Court has recognized, laws enacted for illegitimate reasons generally will have their intended effect. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 580 (2000) ("It is unnecessary to cumulate evidence of [the blanket primary's allegedly severe impact on political parties' ability to nominate their candidates of choice], since, after all, the whole *purpose* of Proposition 198 was to favor nominees with 'moderate' positions.").

All of this provides much cause for skepticism about the Indiana voter ID mandate. Its extreme outlier status, relative to the practices of other States, is not the only danger sign. Equally cautionary is the partisan lineup of votes behind the law's enactment (all Republicans voted for it, and all Democrats against it), combined with the peculiar and seemingly punitive two-trips accommodation for indigents unable to obtain qualifying ID without payment of a fee. These factors suggest that an exclusionary motive may have been afoot, given that poor people are likely to vote for Democrats. *Cf. Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("Fencing out from the franchise a sector of the population *because of the way they may vote* is constitutionally impermissible.") (emphasis added; internal citations and quotation marks omitted). Taken together, and

considered alongside empirical studies which show that low-income and minority citizens are comparatively less likely to have a driver's license,[18] these observations call into serious question whether Indiana's photo ID requirement really is a "reasonable, nondiscriminatory" restriction rather than a "severe" one.

It bears emphasis that the danger-signs predicate for heightened scrutiny does not require this Court or any other to conclude that Indiana's Republican lawmakers acted in bad faith when voting for the photo ID requirement. The purpose of the inquiry is not to impugn legislators' motives. The aim is simply to establish whether there are enough signs of aberrance to warrant heightened scrutiny.

It is open to this Court to address the apparent danger signs and, if appropriate, to apply strict scrutiny. *Amici* believe, however, that the better course would be vacatur accompanied by a clarifying statement about the danger-signs approach. *Cf. Ga. v. Ashcroft*, 539 U.S. 461 (2003) (similarly disposing

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[18] Matt A. Barreto, et al., *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* (Nov. 8, 2007), available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf; Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006), *available at* http://vote.caltech.edu/VoterID/CitizensWithoutProof.pdf.

of a case presenting major unresolved questions about the retrogression standard under Section 5 of the Voting Rights Act). The correct application of the danger-signs model in the instant case is likely to require further factfinding. The district court made no determination, for example, regarding the stringency of Indiana's voter-identification requirements relative to those in place in other States. Although it appears to us that Indiana's requirement is the most restrictive in the nation, we suggest that the district court assess this matter in the first instance and then decide whether strict scrutiny is warranted on account of danger signs.

CONCLUSION

We urge this Court to vacate the decision below and remand for further proceedings. The Court should clarify that direct, non-severe barriers to voter participation are permissible only if *reasonably necessary* to important regulatory purposes.

Alternatively or in addition, this Court should vacate and remand with instructions for determining whether elevated scrutiny is warranted. In deciding whether to apply strict scrutiny, the lower court should focus on the unequal burdens imposed on voters. It should compare the burdens imposed by Indiana's practice to the typical alternative in other States. And, if reliable empirical evidence about consequences is unavailable, the level of scrutiny should turn on the presence or absence of objective "danger signs" suggesting that the requirement's constitutional costs are likely to outweigh its benefits.

Respectfully submitted,

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